No. 20,930

United States Court of Appeals

For the Ninth Circuit

San Francisco Mining Exchange,
Petitioner,

vs.

Securities and Exchange Commission,
Respondent.

REPLY BRIEF FOR PETITIONER

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I.

THE AMERICAN CYANAMID CASE, RECENTLY DECIDED IN THE SIXTH CIRCUIT, SUPPORTS PETITIONER'S CONTENTION THAT IT WAS ENTITLED TO THE ISSUANCE OF SUBPOENAS, SO THAT IT MIGHT PRODUCE EVIDENCE ON THE ISSUE OF BIAS AND PREJUDICE OF THE COMMISSION MEMBERS.

One of the major legal issues raised in our Opening Brief for Petitioner involved the contention that petitioner San Francisco Mining Exchange was entitled to the issuance of subpoenas so as to afford it an evidentiary hearing on the question of the possible bias and prejudice of one or more members of the Securities and Exchange Commission (at pp. 26-40).

In developing the argument that this point presented an example of what currently has become a major prob-

lem in the field of administrative law, we cited an eminent authority direct from the inner administrative circles. He spoke out in support of our contention that Petitioner had raised an issue of major proportions, when he wrote:

> "A major problem now seems to be developing, however, around that vital phrase, 'informed by experience.' The question is being raised as to whether agency members can be so well 'informed by experience' that their minds are already closed before particular cases reach them for adjudication—whether they have, in short, 'decided in advance' the issues involved and are therefore, 'disqualified' to hear and adjudicate those matters.
>
> "In recent weeks the agencies and the courts have been presented with a rash of 'bias' cases." (Op. Br., p. 28.)

The author of that statement was the distinguished chairman of the Federal Trade Commission, Honorable Paul Rand Dixon, writing for the Federal Bar Journal on the subject " 'Disqualification' of Regulatory Agency Members: The New Challenge to the Administrative Process" (25 Fed. B.J. 273, Summer, 1965).

Our Opening Brief for Petitioner was filed on June 21, 1966. While it was being printed for filing the Court of Appeals for the Sixth Circuit issued an opinion confirming Chairman Dixon's worst fears for the administrative process (*American Cyanamid Co. v. Federal Trade Commission,* 363 F. 2d 757, June 16, 1966). The court (in an opinion written by Circuit Judge Harry Phillips) unanimously *held Chairman Dixon personally disqualified to sit in judgment because he had previously investigated*

many of the same facts as counsel for a congressional committee. The court went on to find that his participation in the administrative hearing and determination amounted to a denial of due process which invalidated the order under review (p. 767).

The conclusionary portion of that opinion, particularly pertinent herein, included the following statement of the controlling rule in disqualification for prior administrative "bias":

> "Under the facts and circumstances of this case we conclude that *the participation of Chairman Dixon in the hearing 'amounted . . . to a denial of due process which invalidated the order under review.' Texaco, Inc. v. Federal Trade Commission, supra,* 336 F. 2d 754, 760 (C.A.D.C.), vacated and remanded on other grounds. 381 U.S. 739.
>
> As said in *Amos Treat & Co. v. Securities and Exchange Commission,* 306 F. 2d 260, 267 (C.A.D.C.):
>
> '[A]n administrative hearing of such importance and vast potential consequences must be attended, not only with every element of fairness, but with the very appearance of complete fairness. Only thus can the tribunal conducting a quasi-adjudicatory proceeding meet the basic requirement of due process.'
>
> "In *Trans World Airlines v. Civil Aeronautics Board,* 254 F.2d 90, 91 (C.A.D.C.), Judge Prettyman said:
>
> 'It is plain that in this statute Congress contemplated an adjudicatory proceeding and conferred upon the Board in this respect quasi-judicial functions. The fundamental requirements of fairness in the performance of such functions require

at least that one who participates in a case on behalf of any party, whether actively or merely formally by being on pleadings or briefs, take no part in the decision of that case by any tribunal on which he may thereafter sit.'

"*It is fundamental that both unfairness and the appearance of unfairness should be avoided. Wherever there may be reasonable suspicion of unfairness, it is best to disqualify.* See *Prejudice and the Administrative Process,* 59 Nw. U. L. Rev. 216, 231 (1964); *Disqualification of Administrative Officials for Bias,* 13 Vand. L. Rev. 713, 727 (1960).

It is to be emphasized that the Commission is a fact-finding body. As Chairman, Mr. Dixon sat with the other members as triers of the facts and joined in making the factual determination upon which the order of the Commission is based. As counsel for the Senate Subcommittee, he had investigated and developed many of these same facts.

The result of the participation of Chairman Dixon in the decision of the Commission is not altered by the fact that his vote was not necessary for a majority. 'Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we may know of whereby the influence of one upon the others can be quantitatively measured.' *Berkshire Employees Association of Berkshire Knitting Mills v. N.L.R.B.,* 121 F. 2d 235, 239 (C.A. 3).

"*We therefore must vacate the order and decision of the Federal Trade Commission and remand the case for a de novo consideration of the record without the participation of Chairman Dixon.* We reject the argument of the Commission that such a holding

'would create an unworkable concept of administrative bias.'" (At pp. 767-768, emphasis added.)

The ruling in the *American Cyanamid* case is entirely consistent with the principles enunciated in the leading authorities that we cited previously in our Opening Brief (Op. Br., pp. 32-38). In fact, the *American Cyanamid* opinion cites with approval two of the identical cases that we relied upon: *Berkshire Employes Association, etc.* (Op. Br., pp. 32-33) and *Amos Treat & Co.* (Op. Br., pp. 34-36), which latter case involved the conduct of Securities & Exchange Commissioner and Chairman Manuel F. Cohen, one of the very commissioners whom we sought to interrogate in this proceeding.

These leading authorities all held that the issue of bias and prejudice is relevant, and that evidence of bias and prejudice on the part of the members of an administrative board should be received.

The *Federal Home Loan Bank Board* case (295 F.2d 403), which we cited at pages 36-37 of our Opening Brief held specifically that subpoenas for the appearance of agency members should be issued in order that an evidentiary hearing might be held to explore the possibility of bias or prejudice on the part of one or more of the members of an agency.

II.

THE BRIEF FOR RESPONDENT MAKES NO ANSWER AT ALL TO PETITIONER'S CONTENTION THAT THE COMMISSION'S REVERSAL OF THE HEARING EXAMINER'S ORDER DIRECTING THE ISSUANCE OF SUBPOENAS TO THE COMMISSION MEMBERS THEMSELVES CONSTITUTED A DENIAL OF DUE PROCESS OF LAW.

A reading of the Brief for Respondent Securities and Exchange Commission discloses that Respondent has failed to make any response at all to one of Petitioner's major points.

The Brief for Respondent is entirely devoid of any answer to, or argument against, our contention that the Commission's order reversing the Hearing Examiner's direction that subpoenas ad testificandum be issued denied to petitioner due process of law.

It must be kept clearly in mind that on February 11, 1963, while the case for Petitioner (then the respondent) was still open, and prior to submission, its counsel presented to Hearing Examiner Ewell two separate and independent applications for the issuance of subpoenas. They were, as follows:

(1) An Application for Issuance of Subpoena. This simply requested the issuance of a subpoena ad testificandum directed to the five members of the Commission and its secretary; and

(2) An Affidavit and Application for Issuance of Subpoena Duces Tecum. This requested the issuance of a subpoena duces tecum to the Commission's secretary, one Orval L. DuBois.

Under the Commission's own Rules of Practice (17 CFR 201), as they then existed, different procedures

applied to the respective applications. Rule 14(b)(1) controlled the issuance of "Subpoenas". It provided:

> "(1) Any member of the Commission, the hearing officer or any other officer designated by the Commission for the purpose, in connection with any hearing ordered by the Commission,
>
> (i) *Shall* issue subpoenas requiring the attendance and testimony of witnesses at any designated place of hearing, *upon application* therefor by any party, and
>
> (ii) *May* issue subpoenas requiring the production of documentary or other tangible evidence at any designated place of hearing, *upon written application* by any party, *which shall include a showing of the general relevance, materiality and reasonable particularity of the documentary or other tangible evidence described and the facts to be proved by them.*" (Emphasis added.)

It will be seen at once that, as to a subpoena ad testificandum, there was no requirement of either an affidavit or a showing of relevance, or even of a written application. Furthermore, upon application being made, either orally or in writing, issuance of the subpoena was *mandatory.*

A powerful argument in support of Petitioner's contention on this point is found in the circumstances that, shortly after we stressed the important distinctions in the portions of the rule pertinent to the issuance of the respective types of subpoenas, the Commission revised Rule 14(b)(1) so as to provide an identical procedure for both subpoenas ad testificandum and subpoenas duces tecum. The revised rule provided for a discretion in the person

from whom either type of subpoena is requested to require a preliminary showing of "general relevance and reasonable scope of the testimony or other evidence sought." (See present Rule 14(b)(1) [17 CFR 201.14 (b)(1).]

The proper interpretation of both the Rules and the controlling legal authorities was explored at length in a colloquy between Hearing Examiner Ewell and counsel for Petitioner, as we pointed out at pages 18-23 of our Opening Brief.

As will be noted by a reading of the portions of the record that are referred to in those pages of our Opening Brief, immediately following the presentation of this application Hearing Examiner Ewell expressed his tentative views as to the issuance of a subpoena ad testificandum as follows:

(1) There was no special requirement for issuance, other than an application;

(2) The application need not be in writing;

(3) There was no requirement of any showing of relevancy or other qualification;

(4) Upon application being made, the issuance of the subpoena was mandatory; and

(5) Since the issue of bias and prejudice was relevant, evidence of it could have been introduced as part of petitioner's case, so it was entitled to the issuance of the subpoena to enable it to produce such evidence.

(6) The Hearing Examiner preferred to have time to research the point and consider briefs before issuing his ruling.

As we pointed out at pages 24-25 of the Opening Brief, Hearing Examiner James G. Ewell issued on September 10, 1963 his "Ruling and Order on Application for Certain Subpoenas ad Testificandum" (R., pp. 5137-5138), in which the conclusion stated was that the application:

"is hereby GRANTED."

The full text of the pertinent portion of the "Ruling and Order", was the following:

> "Now, therefore, upon consideration of the foregoing, the briefs heretofore submitted and the principles set forth in the memorandum and order of the undersigned dated March 15, 1963, aforesaid, indicating that, under the provisions of Rule 14(b)(1)(i) of the Commission's Rules of Practice, *issuance of subpoenas ad testificandum under application of any party is mandatory, the pending application for issuance of subpoenas directed to each member of the Commission and to its Secretary to appear and testify in this proceeding at the instance of counsel for the respondent, is hereby GRANTED; said subpoenas to be made returnable at such time and place as may hereafter be agreed upon by the parties, and*
>
> *It is so ORDERED."* (R., p. 5138.)

This "Ruling and Order" of the Hearing Examiner, which found in favor of Petitioner's application, and which was in conformity with his tentative views as expressed at the hearing on February 11, 1963 (supra, p. 6), was not acceptable to the Division of Trading and Exchanges. It excepted, and the Commission eventually ruled, on February 26, 1964 (R., pp. 5148-5150), that:

> ". . . the ruling of the hearing examiner granting the request of the Exchange for issuance of sub-

poenas ad testificandum be *reversed,* and that such subpoenas not be issued."

The members of the Commission, to whom the Hearing Examiner had ordered that subpoenas should be directed, thus stood exposed as having overruled their own Hearing Examiner, as having ignored pertinent legal authority, and as having refused to allow any one or more of their own members to be questioned openly as to his or their possible bias and prejudice.

It was the very individuals to whom the subpoenas were to be directed who ruled that they, themselves, should not be subpoenaed and questioned as to their own bias and prejudice.

It was this portion of the Opening Brief, setting forth Petitioner's contention that the denial of the application for subpoenas ad testificandum constituted a denial of due process of law, that Respondent has failed to answer at all.

A reading of the Brief for Respondent (especially at pages 19-31) readily discloses that the discussion there set forth relates only to the second, independent application, which was for the subpoena duces tecum addressed to the Commission's secretary, one DuBois. This second and separate application for a subpoena duces tecum was discussed separately in our Opening Brief (at pages 18-24).

III

SINCE THERE WAS NO CHALLENGE OF THE QUALIFICATIONS OF THE HEARING EXAMINER, SECTION 7(a) OF THE ADMINISTRATIVE PROCEDURE ACT WAS NOT APPLICABLE—BUT, EVEN IF IT DID APPLY, THERE WAS A TIMELY FILING OF AN AFFIDAVIT CHARGING BIAS AND PREJUDICE ON THE PART OF THE COMMISSION MEMBERS.

The Respondent Securities and Exchange Commission seeks to default Petitioner on the basis of a technicality, arguing that: "Petitioner Has Not Complied with Section 7(a) of the Administrative Procedure Act" (Br. for Resp., pp. 37-40).

A reading of Section 7(a) is not persuasive. Obviously, its purpose was to require the prompt filing of an affidavit of bias and prejudice on the part of a *hearing officer* or *hearing examiner* who was about to undertake a hearing. The section is couched in the terminology applicable to the duties and functions of hearing officers. There is nothing in the wording of the section itself or in its functional purpose that suggests that it was intended to apply to agency members.

The full text of Section 7(a) is as follows:

> "The functions of all *presiding officers and of officers participating in decisions* in conformity with section 8 shall be conducted in an impartial manner. *Any such officer* may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of *any such officer*, the agency shall determine the matter as a part of the record and decision in the case." (Emphasis added).

Furthermore, Petitioner never challenged Hearing Examiner James G. Ewell's qualifications to conduct the

hearing. That was made clear by counsel for Petitioner when he stated:

> ". . . I certainly did not imply, and trust it was not inferred that there was any accusation levelled at this hearing officer, and I am certain that the record would not support any such accusation." (R., pp. 1545-6).

In face of the uncontradicted record, with no charge of bias and prejudice on the part of the Hearing Examiner ever having been asserted, reliance by the Respondent upon its claim of non-compliance with Section 7(a) is an empty gesture and an effort to avoid the plain legal consequences of the Commission's refusal to issue subpoenas directed to its own members.

Even if Section 7(a) of the Administrative Procedure Act should be interpreted as being applicable to agency members themselves (that is, the members of the Securities and Exchange Commission), it seems clear that the "Affidavit and Application for Issuance of Subpoena Duces Tecum" as filed with the Hearing Examiner during the session on February 11, 1963 constituted a sufficient and timely compliance with the requirements of that section. This would be true even though the principal purpose of the affidavit was to support the application for the subpoena duces tecum.

The affidavit set forth, among other matters, these statements:

> "Said documentary and tangible evidence is relevant and material to a determination, among other things, of the issue as to whether or not the members of the Securities and Exchange Commission *have*

prejudged the issues in these proceedings and are biased and prejudiced against respondent to such an extent as to render them, and each one of them, incompetent to judge said matter fairly, impartially or dispassionately. . . . Affiant is informed and believes, and therefore *alleges the fact to be that said members have already formulated and hold the opinion* that the registration of the San Francisco Mining Exchange should be terminated; that said opinion on their part is based upon the consideration of evidence and matters not a part of the record in these proceedings." (R., pp. 4969-4970).

Respondent concedes that a filing of an affidavit of bias and prejudice is timely within the meaning of Section 7(a) when such filing is made "at the first reasonable opportunity after discovery of the facts tending to show disqualification." (Br. for Resp., pp. 38-39).

In this proceeding, the affidavit that we have referred to was filed on February 11, 1963, while Petitioner was still engaged in the tedious process of attempting to discover the facts. As has been shown, the principal purpose of the affidavit was to support an application for the issuance of a subpoena duces tecum to aid Petitioner in its effort to develop the facts as to bias and prejudice on the part of the Commission members.

At the time that the affidavit was filed and the applications for the issuance of subpoenas submitted, the hearing was still proceeding before the Hearing Examiner. Petitioner (respondent then) had not yet submitted its case, and the matter was not then before the members of the Commission for any purpose—decisional or otherwise.

Petitioner's reason for applying for the issuance of the subpoenas ad testificandum addressed to the Commission members was to enable it to ascertain the factual details upon which it could base in good faith a firm charge of bias and prejudice on the part of one or more of the Commissioners. In addition, the facts so determined could be availed of in support of any affidavits of bias and prejudice that might be required. Certainly these factual details would be pertinent before the members of the Commission could—in the language of Section 7(a)—"determine the matter as a part of the record and decision in the case."

The ruling of the Commission ordering "that such subpoenas not be issued", which Petitioner challenges in this proceeding, effectively blocked the effort of Petitioner to establish the facts by discovery. At that point Petitioner had exhausted its administrative remedy, and, if Section 7(a) required the filing of an affidavit of bias and prejudice, certainly the affidavit filed on February 11th was a timely and sufficient compliance with the requirements of that section.

The affidavit and the applications for the issuance of the subpoenas were filed with the Hearing Examiner on February 11, 1963. Counsel for Respondent shortly challenged their timeliness. The Hearing Examiner expressed his view, as follows:

> "Hearing Examiner Ewell: I have given some thought to the matter, and while I agree that timeliness is a matter to be considered, I think, as every lawyer knows, the facets of a lawsuit change from hour to hour. *I don't think there is any precise limita-*

tion upon the moment of time at which a subpoena or the desirability of certain testimony or evidence might be deemed essential in the opinion of the counsel for the protection of his client, whoever he may be.'' (R., p. 2288, emphasis added).

Petitioner submits that, even if Section 7(a) of the Administrative Procedure Act should be interpreted as applying to agency members as well as hearing officers, there was, under the circumstances shown, a compliance with the requirements of the section by the filing in a timely manner of an affidavit charging bias and prejudice with the required sufficiency.

IV

THE EVIDENCE PRESENTED BY PETITIONER ON THE ISSUE OF THE CONTRIBUTION AND VALUABLE SERVICE OF THE MINING EXCHANGE TO THE MINING INDUSTRY AND THE ECONOMY OF THE WESTERN STATES WAS UNCONTRADICTED: IT SUPPORTS THE CONCLUSION AND REMEDY RECOMMENDED BY THE HEARING EXAMINER.

In the Opening Brief for Petitioner, at pages 41-49, we presented the position that the conclusion and remedy recommended by the Hearing Examiner were supported by both the record of the proceedings and the record of performance by the Mining Exchange, and that the order of the Commission should be set aside.

The Brief for Respondent challenges that position (at pages 15-17), arguing that two inconsistent conclusions may be drawn from the same evidence, and that under such circumstances the agency's finding is supported by substantial evidence.

The flaw in Respondent's reasoning is that it offered no evidence whatsoever on the issue of the contribution and valuable service rendered by the San Francisco Mining Exchange to the mining industry and the economy of the western states. Counsel for the Respondent was content to scoff at the evidence presented by Petitioner, expressing his opinion that it was "totally lacking in evidentiary value" (R., pp. 2256, 2266).

As we stated at pages 42-43 of the Opening Brief, the evidence presented by the San Francisco Mining Exchange on this issue was not contradicted or challenged by any showing. Presentations by Philip R. Bradley, Chairman of the State Mining Board of the State of California; by G. Louis Fox, Executive Vice President of the San Francisco Chamber of Commerce; by both George Christopher, Mayor of the City and County of San Francisco and Congressman John F. Shelley; and by Grant Sawyer, Governor of the State of Nevada, were received and admitted as part of the record (see Op. Br., pp. 43-45, and R., pp. 5474-5481).

It was upon the basis of this uncontradicted showing that the Hearing Examiner based the conclusion of his "Recommended Decision" (R., pp. 5483-5484), holding that:

> ". . . The public interest . . . might well be served if the present officials of the Mining Exchange were accorded a further but final opportunity, under the guidance of their counsel, to reorganize the Mining Exchange. . . ."

The evidence on this issue being uncontradicted, the authorities cited by Respondent are not in point. To the

contrary, the eminent justice of the Hearing Examiner's recommendation is demonstrated by the fact that since the filing of the charges, the Mining Exchange has survived four and one-half years of probation of the most severe type, under the closest and most critical scrutiny, without being charged with any additional alleged violations of either statute or rule.

V.

CONCLUSION

The "Order Withdrawing Registration of National Securities Exchange" should be set aside. It should be modified by the entry of an order and judgment providing for a reorganization of the Mining Exchange in accordance with the recommendations of the Hearing Examiner.

Dated: December 23, 1966.

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